FILE COPY

Office - Supreme Court, U.S.
FILED
FEB 4 1953
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 585

J. I. CASE COMPANY, BETTENDORF WORKS,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CLARK M. ROBERTSON,
O. S. HOEBRECKX,
Counsel for Petitioner.

HAMMERSMITH-KORTMEYER CO. MILWAUKEE

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement of the Case	3
Specification of Errors to be Heard	5
Reasons for Granting Writ	5
Conclusion	13

Cases Cited

Carter Carburetor Corp. v. NLRB, 140 F. (2d) 714 (CA 8; 1944) 5, 7, 8, 10

Conn, Ltd. v. NLRB, 108 F. (2d) 390 (CA 7; 1939) 8, 10

Home Beneficial Life Ins. Co. v. NLRB, 159 F. (2d) 280 (CA 4; 1947) 9, 10

International Union, UAW-AFL, Local 232 v. WERB, 336 US 245, 69 S. Ct. 516, 93 L. Ed. 651 (1949) 5, 6, 8, 11

Marshall Field & Co. v. NLRB, 31 LRRM 2073 (CA 7; 1951) 12

NLRB v. Condenser Corp., 128 F. (2d) 69 (CA 3; 1942) 8

NLRB v. Edinburg, 147 F. (2d) 353 (CA 5; 1945) .. 9

NLRB v. Empire Furniture Corp., 107 F. (2d) 92 (CA 6; 1939) 9

Page

NLRB v. Globe Wireless, Ltd., 193 F. (2d) 748 (CA 9; 1951) 7

NLRB v. Kennametal, Inc., 182 F. (2d) 817 (CA 3; 1950) 5, 7, 8, 9, 10, 12

NLRB v. Montgomery Ward & Co., 157 F. (2d) 486 (CA 8; 1946) 9, 10

NLRB v. Mt. Clemens Pottery Co., 147 F. (2d) 262 (CA 6; 1945) 8

NLRB v. Rockaway News Supply Co., Inc., 197 F. (2d) 111 (CA 2; 1952) 9

NLRB v. Wm. Davies Co., 135 F. (2d) 179 (CA 7; 1943) 9, 11

Peyton Packing Co., 49 NLRB 828 12

Republic Aviation Corp. v. NLRB, 324 US 793, 65 S. Ct. 982, 89 L. Ed. 1372 (1945) 10, 12

Wyman-Gordon v. NLRB, 153 F. (2d) 480 (CA 7; 1946) 9

Statutes Cited

National Labor Relations Act, as amended, 61 Stats. 136, 29 USC Supp. III, Secs. 141 et seq.

Sec. 7 ..... 2, 3

Sec. 8(a) 3

Legislative History

House Conference Report No. 510; I Legislative History of Labor Management Relations Act of 1947 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No.....

J. I. CASE COMPANY, BETTENDORF WORKS,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

To the Justices of the Supreme Court of the United States:

J. I. Case Company, a corporation, Petitioner herein, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered on November 7, 1952 (R, 14-17)[1],

[1] References to the Record as printed for the Court below will be designated as "R1"; References to Respondent's Appendix as printed for the Court below will be designated as "R2"; References to the Appendix as printed by the National Labor Relations Board for the Court below will be designated as "R3"; and References to the proceedings before the Court below will be designated as "R".

enforcing as modified an order of the National Labor Relations Board, dated July 10, 1951.

Opinions Below

The decision and order of the National Labor Relations Board are reported in 95 NLRB 47 (R1, 24-42). The opinion of the Court of Appeals is reported in 198 F. (2d) 919 (R, 6-14).

Jurisdiction

The judgment of the Court of Appeals was entered on November 7, 1952. The jurisdiction of this Court is invoked under 28 USC 1254(1).

Question Presented

Whether an attempt by a small number of employees to organize a strike by leaving their jobs to march through their own and other working areas during working hours, contrary to the reasonable requirements of the employer, is a protected concerted activity under Section 7 of the National Labor Relations Act.

Statutes Involved

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136), are as follows:

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . "

"Sec. 8(a). It shall be an unfair labor practice for an employer —

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;"

Statement of the Case

Upon a charge filed by Local 1008, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, CIO, herein called the "Union" (R1, 2), the National Labor Relations Board, herein called the "Board," issued a complaint against Petitioner, alleging that Petitioner discharged three employees and laid off two employees "for the reason that said employees joined and/or assisted the Union, and had otherwise engaged in concerted activities for the purpose of collective bargaining, or other mutual aid or protection, all with the intent thereby to discourage membership in the Union" (R1, 8), and did thereby discourage membership in the Union (R1, 9). After the usual hearing, the Board issued its order requiring Petitioner to cease and desist from discouraging membership in the Union; from in any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7; and ordered Petitioner to reinstate with back pay the three discharged employees and to make whole the two employees who were laid off for the loss of pay suffered as a result of the disciplinary layoff.

Petitioner refused to comply with the order of the Board, and a petition for enforcement was filed with the Court of Appeals for the Eighth Circuit (R1, 42). The Court below refused to accept the Board's finding that the discharges and the layoffs were caused by the employees' union activities which discouraged member-

ship in the Union (R, 12-13), but found that the employees nevertheless had engaged in protected concerted activities (R, 8-10). The Court entered its judgment accordingly requiring Petitioner to cease and desist from interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act and ordered Petitioner to offer reinstatement and back pay to the three discharged employees and to pay the two laid-off employees for the time they lost, as well as the usual requirements of notifying the Board with respect to compliance and posting a notice.

The factual situation involved is as follows, as stated in the opinion of the Court below (R, 7-8).

> "The discharges and layoffs involved grew out of an attempt one noon by the three employees discharged to instigate a walkout from the plant of all union employees, because of the previous firing that morning of a union steward. The firing of this steward, however, was not shown to have had a union basis, nor did the Board so find. The attempted walkout therefore amounted simply to a protest against the discharge generally of a fellow-union employee.
>
> "The three employees who were the ringleaders of the walkout attempt had made known their plans to some of the other employees during the lunch hour in the plant cafeteria. They left the cafeteria after most of the employees had returned to their stations and instituted a march through several aisles of the plant, expecting that the other employees would join them. Some sporadic accretions occurred, followed by withdrawals, but at no time during the course of the march did there exist a phalanx of more than 12 or 15 persons, out of the plant's 2,000 employees.
>
> "When the leaders reached a point near their own work stations, they discovered that they were being accompanied by only the two employees laid off. They accordingly disbanded and returned to their work.

Their efforts had consumed approximately 15 minutes of regular working time.

"The reason given by the employer for the discharge of the three ringleaders was that they had 'walked off job without permission of foreman and attempted to incite a plant walkout.' The ground stated for the layoff of the other two employees was 'helping and participating in unlawful walkout.'"

The Court below also found that the Record contained no evidence of any other violation of the Act (R, 11).

Specification of Errors to be Heard

The Court of Appeals erred:

(1) In holding that employees had a right under the National Labor Relations Act to attempt to organize a strike in the plant during working hours;

(2) In failing to deny enforcement of the Board's order as a whole in view of its findings that the discharges and layoffs had not discouraged membership in the Union, contrary to the allegations in the complaint and the findings of the Board; and

(3) In issuing its decree of enforcement.

Reasons for Granting Writ

(1) The decision of the Court below in the instant case and in *NLRB v. Kennametal, Inc.* (CA 3; 1950), 182 F. (2d) 817, and *Carter Carburetor Corp. v. NLRB* (CA 8; 1944), 140 F. (2d) 714, upon the authority of which the instant case was decided, are directly in conflict with the decision of this Court in *International Union, UAW-AFL, Local 232 v. WERB* (1949), 336 US 245, 69 S. Ct. 516, 93 L. Ed. 651. This Court, in the *International Union*

case, *supra,* found no conflict between any right protected by the National Labor Relations Act and an order by the Wisconsin Employment Relations Board which required the Union to cease and desist from:

> " * * * inducing work stoppages during regularly scheduled working hours; or engaging in any other concerted effort to interfere with production of the complainant, except by leaving the premises in an orderly manner for the purpose of going on strike." (P. 250)

In the instant case, the affected employees admittedly attempted to induce "work stoppages during regularly scheduled working hours," and admittedly interfered with production in the plant rather than leaving the premises for the purpose of going out on strike (R, 8).

The right of employees to quit their employment for the purpose of striking in support of their demands, whatever they may be, is not here questioned. This Court, in the *International Union* case, *supra,* recognized the distinction between a strike and the type of situation here involved when it stated:

> "If we were to read Section 13 as we are urged to do, to make the strike an absolute right and the definition to extend the right to all other variations of this strike, the effect would be to legalize beyond the power of any state or federal authorities to control not only the intermittent stoppages such as we have here but also the slowdown and perhaps sit-down strike as well." (P. 264)

Thus, this Court recognizes that all concerted activities are not lawful, even though they partake of the nature of a strike and so stated:

> "To hold that the alleged fixed Board interpretation has irrevocably labeled all concerted activities 'protected' would be in the teeth of the Board's own

language and would deny any effect to the Courts of Appeals' decisions." (P. 257)[2]

The Court below, relying principally upon the *Kennametal* case, *supra,* held that since a full-fledged strike is a protected activity, lesser forms of interference with the employer's business and production facilities are equally protected and less objectionable.

The decision in the *Carter Carburetor* case, *supra,* also held that the inducement of other employees in the plant during working hours to join in a work stoppage in an effort to enforce their demands was a protected activity (P. 718). It is believed, however, that *NLRB v. Globe Wireless, Ltd.* (CA 9; 1951), 193 F. (2d) 748, cited by the Court below in support of its holding is not in point, since the employees in that case, after presenting their demands and being discharged, "thereupon * * * at once left respondent's premises." (P. 750). In the instant case, no demand was presented and the employees

---

[2] This view accords with the legislative history of the Act. See House Conference Report No. 510, 30, 55; I Legislative History of the Labor Management Relations Act 1947, 543, 559, wherein it is stated:

"* * * Furthermore, in section 10(c) of the amended act, as proposed in the conference agreement, it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of any back pay if such individual was suspended or discharged for cause, and this, of course, applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity. * * * (p. 39; p. 543)

"* * * The conference agreement . . . simply provides that no order of the Board shall require reinstatement or back pay for any individual who was suspended or discharged for cause. Thus employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or for other cause (See *Wyman-Gordon v. NLRB,* 153 Fed. (2) 480), will not be entitled to reinstatement. * * * " (p. 55; p. 559)

carried on their protest on the premises during working hours.

The sum and substance of the decision below and that in the *Carter Carburetor* and *Kennametal* cases, *supra,* is that employees are entitled under the Act to engage in concerted activities during working hours in working areas. This is contra to the decision of this Court in the *International Union* case, *supra,* that inducing work stoppages during working hours and carrying on strike activities inside the plant is not a protected activity under the National Labor Relations Act.

(2) The decision of the Court below and the cases upon which it relied are in direct conflict with other decisions of the Courts of Appeals on the same question.

The following decisions all fully recognize the obligation of the employee while working to submit to the reasonable requirements of the employer during working hours. These decisions negate the concept that just because the employees are engaging in a concerted protest to enforce a demand, they may do so on the employer's premises during working hours without leaving the plant for the purpose of going out on strike.

Employees may be discharged when they stop work in the middle of a working day and stand idle, insisting that their demands be met (*NLRB v. Condenser Corp.* (CA 3; 1942), 128 F. (2d) 69).

They may be discharged for leaving their jobs before the close of the work day because they refused to work overtime (*NLRB v. Mt. Clemens Pottery Co.,* (CA 6; 1945), 147 F. (2d) 262), or in order to enforce a demand for a certain rate of overtime pay (*Conn, Ltd. v. NLRB*

(CA 7; 1939), 108 F. (2d) 390), while in both cases, intending to work the next day.

An employer may discharge employees who refuse to perform certain parts of their assigned duties, although the employees' refusal may be predicated upon a disinclination to cross a picket line at the plant of another employer (*NLRB v. Rockaway News Supply Co., Inc.* (CA 2; 1952), 197 F. (2d) 111, certiorari granted, — U.S. —, 73 S.Ct. 106), or to handle the work rerouted from another plant of the employer, the employees of which were on strike (*NLRB v. Montgomery Ward & Co.* (CA 8; 1946), 157 F. (2d) 486), or to comply with rules established for the conduct of the business (*Home Beneficial Life Ins. Co. v. NLRB,* (CA 4; 1947), 159 F. (2d) 280).

An employee may be fired for union solicitation during working hours (*NLRB v. Wm. Davies Co.* (CA 7; 1943), 135 F. (2d) 179; *NLRB v. Empire Furniture Corp.* (CA 6; 1939), 107 F. (2d) 92), or for union discussion during working hours (*NLRB v. Edinburg* (CA 5; 1945), 147 F. (2d) 353.)

Employees who induce others to and themselves engage in a "slowdown" may be discharged (*Wyman-Gordon v. NLRB* (CA 7; 1946), 153 F. (2d) 480).

The *Condenser, Conn,* and *Home Beneficial Life* cases, *supra,* were cited with approval by this Court in the *International Union* case, *supra,* at p. 257.

In all the foregoing cases, the activities of the employees impinged upon the right of the employer to operate and manage his business. These decisions are in direct conflict with the doctrine of the instant case and the *Kennametal* case, *supra,* to the effect that since a strike is a lawful concerted activity, any other lesser form

of interference with the employer's business comes within the protection of the Act. The reference by the Court below to the *Conn, Montgomery Ward,* and *Home Beneficial Life* cases, *supra* (R, 9-10) represents a distinction without a difference.

(3) While admittedly, there are varying factual circumstances in the cases cited above as being in conflict with the decision in the instant case, these cases all recognize the general principle that concerted activities to be protected under the Act must not invade the co-equal right of the employer to require that "working time must be for work." (*Republic Aviation Corp. v. NLRB,* (1945), 324 U.S. 793, 803, 65 S.Ct. 982, 89 L. Ed. 1372.)

The instant case and the decisions in the *Kennametal* and *Carter Carburetor Corp.* cases, *supra,* all disregard the fact, fully heeded by other Courts of Appeals, that the activities involved did not constitute a quitting of employment for the purpose of going out on strike. An employee "must be on the job subject to the authority and control of the employer or off the job as a striker, in support of some grievance." (*Conn* case, *supra,* p. 397). The employees here were not discharged for going out on strike, but were discharged for attempting during working hours to solicit other employees at their work stations to quit their employment for the purpose of going out on strike. The clear implication of the decision in the instant case and the decisions cited in support by the Court below is that so long as the interference with production is in the nature of a protest engaged in for the employees' mutual aid or protection, it is within the protection of the Act. Such a rationale would leave the employer helpless against concerted slowdowns, sitdowns, union meetings in or outside the plant during

working hours, and any other device designed to harass the employer without subjecting the employees to the loss of earnings incident to a strike. Certainly, if an employee is subject to discharge for soliciting union membership during working hours (*Wm. Davies Co.* case, *supra*), the mass solicitation of hundreds of employees to go out on strike, occurring during working hours, is equally outside the protection of the Act.

(4) Clearly, the question presented is of importance to the administration of the National Labor Relations Act. The conflicting decisions as to what constitutes protected concerted activities for employees' mutual aid and protection leave employers, employees, and unions in doubt as to what is and what is not protected activity. Employers, under the obligation to maintain orderly and safe conditions in their plants to avoid industrial injuries, to fulfill defense and other contracts, to operate their plant efficiently for the benefit of stockholders, and so that the public may enjoy lower prices, under present circumstances are at a loss to know what can be done to meet such costly interferences with production.

This Court, recognizing the dilemma of the employer in these situations, commented in the *International Union* case, *supra*:

> "* * * the management also would be disabled from any kind of self-help to cope with these coercive tactics of the union except to submit to its undeclared demands. To dismiss or discipline employees for exercising a right given them under the Act or to interfere with them or the union in pursuing it is made an unfair labor practice and if the rights here asserted are rights conferred by the Labor Management Relations Act, it is hard to see how the management can take any steps to resist or combat them without incurring the sanctions of the Act. It is

> certain that such a result would be inconsistent with the whole purpose disclosed by the Labor Management Relations Act amendments to the Labor Relations Act. Nor do we think such is the result of any fair interpretation of the text of the Act." (P. 264)

If the Act gives employees the right to engage in activities detrimental to the employer's interests during working hours on the employer's premises, the area of such permissible activities should be delineated as clearly as possible so that employers, employees, and unions can govern themselves accordingly.

It is a generally accepted principle that "working time is for work," [3] and that the "self-help" activities of employees must take place outside of regular working hours in non-working areas. In the instant case, accepting the facts as stated by the Court below, the concerted activities admittedly took place in working areas during working hours and were designed to interfere with and interrupt the work of other employees (R, 8). The Court below justified its finding that these activities were protected by quoting the following rule as enunciated in the *Kennametal* case, *supra*:

> "The language of the Act does not require and its purposes would not be served by holding that dissatisfied workmen may receive its protection only if they exert the maximum economic pressure and call a strike." (P. 819)

Thus, if the decision below is correct, employees in American industry can, as did the employees here, leave their jobs at any time they wish to roam through the plant

---

[3] *Peyton Packing Co.*, 49 NLRB 828, 843-844, cited with approval in *Republic Aviation Corp. v. NLRB, supra*, pp. 803-804, and in *Marshall Field & Co. v. NLRB*, (CA 7; 1951), 31 LRRM 2073, p. 2078.

during working hours interfering with the work of other employees and return to their jobs when they wish, with complete impunity. Not only is the employer prohibited from penalizing employees for such action, but except for the period that the employees elect to be away from their jobs, the employer is prohibited from replacing them with another employee. It is believed that such a result is not in accord with the broadly accepted principle concerning an employee's obligation to his employer to perform his assigned task during working hours. If the employer-employee relationship is to be subjected to so fundamental a change, such a change should be brought about by the American people through their legislative representatives, and not by Court decision.

Conclusion

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

CLARK M. ROBERTSON,
O. S. HOEBRECKX,
Counsel for Petitioner.

324 East Wisconsin Avenue
Milwaukee 2, Wisconsin
February 3, 1953.